The treatment of transgender and intersex people in the Equal Opportunity Act

The Committee observes that the legal position of transgender and intersex people under the Act is unclear and may be denied a full measure of protection under the Act as a result. The Committee notes that the Act essentially rests on the assumption that every person belongs to one of two sexes, and that many exceptions relate only or principally to the attribute of sex, and the Act does not make adequately address the question of transgender and intersex persons and their non-discrimination rights under the Act in relation to their sex.

Recommendation 58.

The Committee recommends that a further review be undertaken concerning the legal standing of transgender and intersex people in the context of their protection in anti-discrimination law. Pending the outcome of any review, the Committee recommends that interim measures be taken to clarify the status of transgender and intersex people in relation to sex discrimination under the Act.

The Committee notes that transgender and intersex people are protected from discrimination based on their gender identity under the definition of ‘gender identity’ in section 4(1) of the Act whether or not they have had gender re-assignment surgery. However, the Act is unclear about when such a person is to be treated as being of the sex that they have chosen to affirm rather than their birth sex. The Committee notes that a transgender or intersex person could be treated as not being of their affirmed sex, or as being of no sex, and as a consequence of this gap in the law may be deprived of an opportunity to challenge discrimination on the basis of sex. This could arise in the context of restrictions on accommodation for employees\(^{125}\) and restrictions on clubs and sporting activities\(^{126}\) or in other contexts.

The Committee notes that several organisations\(^ {127}\) expressed concern about the impact on transgender and intersex people of their inability to be recognised in their affirmed gender under the Act. The Federation of Community Legal Centres noted that:

\(^{125}\) See for example provision exceptions relating to the provision of single sex accommodation in employment (s. 28), welfare accommodation (s. 55) and student accommodation (s. 56).

\(^{126}\) See for example the exception for clubs that provide different benefits to men and women (s. 63), the private clubs exception (s. 78) and the competitive sports exception (s. 66).

\(^{127}\) See submissions from Victorian Equal Opportunity and Human Rights Commission (7), Federation of Community Legal Centres (691), and evidence given by Transgender Victoria on 4 August 2009.
transgender and intersex people are not even always accommodated in the wording of the Act; for example, section 28 counterposes ‘one sex’ to ‘both sexes’ and so leaves it unclear as to the place of intersex individuals. … Section 55 also facilitates potential discrimination on the basis of gender identity if the person’s own identification is not read as determining the question of the person’s sex.¹²⁸

The Committee notes the example of the temporary exemption granted by the Tribunal to Hanover Welfare Services¹²⁹ allowing it to exclude transgender women who were not born female from a women’s transitional and crisis accommodation service that it ran. The Committee notes the advice of the Commission¹³⁰ that it conducted negotiation and education processes involving the parties to this exemption application, as a result of which the exemption was removed by agreement. Nevertheless, the reported decision granting the exemption still stands.

The Committee notes that in many jurisdictions it is necessary for transgender people to obtain a certificate based on prescribed evidence before their change of gender is officially accepted. For example, the Births, Deaths and Marriages Registration Act 1996 (Vic)¹³¹ requires verification by two doctors that gender re-assignment surgery has occurred before the register of births can be amended to recognise the chosen sex, and a birth certificate recognising the changed sex can be issued. This appears to be a very restrictive criterion and would not necessarily be appropriate as a requirement for recognising a transgender person for other purposes.

The Australian Human Rights Commission has recently completed a report on Sex Files: the legal recognition of sex in documents and government records,¹³² which concluded that simply requiring recognition of the person’s affirmed sex is not an adequate solution to the problem of determining when a transgender person should be recognised under their affirmed gender. That Report recommended that the Federal government should take a leadership role in ensuring that there is a nationally consistent approach to the legal recognition of sex in accordance with its recommendations and with the co-operation of State governments.

The Committee considers that different approaches may be able to be identified for people at different stages along the path to adopting a gender, or that a test that allows for consideration of the interests of the transsexual or intersex person could be developed. For example, the UK Equality Bill 2009 contains a number of exceptions relating to gender reassignment, which are tested by whether the restriction is a proportionate means of achieving a legitimate aim. For example, Schedule 23 — General exceptions provides –

Communal accommodation

3(1) A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—

(a) the admission of persons to communal accommodation;

(b) the provision of a benefit, facility or service linked to the accommodation.

…

¹²⁸ Federation of Community Legal Centres, submission (691).
¹²⁹ Hanover Welfare Services Ltd (Anti Discrimination Exemption) [2007] VCAT 640
¹³¹ See Part 4A—Recognition of Sex (Transsexualism).
(4) In applying sub-paragraph (1)(a) in relation to gender reassignment, account must also be taken of whether and how far the conduct in question is a proportionate means of achieving a legitimate aim.

This approach would allow the circumstances to be assessed in the context of each individual case, and appears to be consistent with the Charter s. 7(2) test for reasonable limitations on rights. The Equality Bill 2009 (UK) contains a similar exception in relation to separate services and single sex services.\(^{133}\)

Sport

The Committee considers that sport involves particular difficulties in dealing with transgender and intersex people as sporting ability often depends on physique and this is related to birth sex. In addition, sport is played at many levels, and what may be suitable to regulate competition at an elite level may not be appropriate for competitions or sporting organisations where the emphasis is on social participation. The Committee does not consider that simply recognising affirmed sex would lead to an appropriate solution in the context of ensuring fair competition.

The Committee notes that there are different legislative approaches to this issue. The ADA (NSW) allows the exclusion of a transgender person from sporting activities for members of their affirmed sex:

38P Sport

(1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.

(2) Subsection (1) does not apply: [to certain roles such as coaching ...]

By contrast, a more nuanced provision exists in the Gender Recognition Act 2004 (UK), which directs attention to the nature of the sporting activity:

19. Sport

(1) A body responsible for regulating the participation of persons as competitors in an event or events involving a gender-affected sport may, if subsection (2) is satisfied, prohibit or restrict the participation as competitors in the event or events of persons whose gender has become the acquired gender under this Act.

(2) This subsection is satisfied if the prohibition or restriction is necessary to secure—

(a) fair competition, or

(b) the safety of competitors,

at the event or events.

(3) “Sport” means a sport, game or other activity of a competitive nature.

(4) A sport is a gender-affected sport if the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport

\(^{133}\) Equality Bill 2009 (UK) Schedule 3 — Services and Public Functions: Exceptions, Part 6 — Separate and single services s. 25.
A similar provision involving the definition of ‘gender-affected activity’ appears in the Equality Bill 2009 (UK): see Part 14 — General exceptions, s. 190 Sport.

The Committee notes, however, that none of these provisions deals with how transgender people are to be treated in terms of their sex.

**General exceptions for transgender and intersex people**

Resolving these issues requires a level of research beyond that possible for the Committee in undertaking this current broad review. However, the Committee believes it may be desirable to adopt interim provisions pending a final full review of this difficult area of discrimination law. The Committee considers that it is in the public interest that the legal status of transgender or intersex persons in relation to accommodation and sporting activities should ultimately be fully addressed. The Committee considers that the approach in s. 3 of Schedule 23 of the Equality Bill 2009 (UK), and in the context of sport, the *Gender Recognition Act 2004* (UK) would provide a basis for an interim approach to sex discrimination against transgender people that should be adopted pending the outcome of a fuller review.

**The position of volunteers under the Act**

**Recommendation 59.**

*The Committee recommends that the question of whether to extend the protection of the Act to volunteers should be considered.*

The Committee notes that the Federation of Community Legal Centres\(^{134}\) contended that some provisions in the Act, while not expressed as exceptions, operate as de facto exceptions by restricting the meaning or scope of prohibited discrimination under the Act. For example, the employment provisions in section 14 of the Act, when read with the definition of ‘employment’ in section 4(1) explicitly exclude protection from discrimination for volunteers. The Federation’s submission contended that volunteers should be given protection under the Act.

The Committee considers that there may be sound policy reasons to consider extending the prohibition against discrimination on the basis of defined attributes to volunteers.

The Committee observes that organisations that routinely rely on volunteers should have an obligation to act in a manner that is in conformity or compatible with the non-discrimination principles in the Act. In making this recommendation the Committee is aware that the form and content of any protection may need careful consideration concerning any reasonable limitations that may need to apply.

The Committee recommends that this question should be the subject of further review.

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\(^{134}\) Federation of Community Legal Centres, submission (691).